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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932

No. 138

JOSEPH F. MILLER, PETITIONER,

vs.

A. C. ADERHOLD, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA, RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR PETITIONER.

DEAN G. ACHESON,
Counsel for Petitioner.

INDEX.

Subject Index.

	Page
Opinion below	1
Jurisdiction	1
Statement	2
Specification of errors	5
Summary of argument	5
Argument	6
I. The first order of the District Court was clearly an indefinite suspension of the imposition of sentence	6
II. The order indefinitely suspending the imposition of sentence was invalid. With the expiration of the trial term, the court, according to the uniform holding of Federal and many State courts, lost jurisdiction thereafter to sentence petitioner	10
III. The Federal Probation Act does not confer the power to suspend sentence except as a necessary incident to subjecting a defendant to the discipline of probation.	19
Conclusion	32
Appendix. Statute involved	33

Citations.

Cases:

Brabandt v. Commonwealth, 157 Ky. 130	16
Burns v. United States, October Term, 1932, No. 378	26
Collins v. State (Okla. Cr. App.), 217 Pac. 896	9, 15
Commonwealth v. Dowdican's Bail, 115 Mass. 133	17
Commonwealth v. Dunleavy, 16 Pa. Sup. Ct. 380	17
Commonwealth v. Maloney, 145 Mass. 205	9
Ex Parte Bugg, 163 Mo. App. 44	16
Ex Parte Clendenning, 22 Okla. 108	16
Ex Parte Cornwall, 223 Mo. 259	16, 29
Ex Parte De Angelo, 50 F. (2d) 847	15, 18, 29
Ex Parte St. Hilaire, 101 Me. 522	17
Ex Parte Singer, 284 Fed. 60	7, 9, 11, 15
Ex Parte United States, 242 U. S. 27	5, 10, 11, 12, 24, 26
Ex Parte Williams, 26 Fla. 310	17
Ex Parte United States, October Term, 1932, No. 19, Original	24
Fuller v. State, 100 Miss. 811, 57 So. 6, 806	16
Gillespie v. Walker, 296 Fed. 330	16
Grundel v. People, 33 Colo. 191	9, 15

Page

Hitchcock v. State, 145 Tenn. 626 15
In re Beck, 63 Kan. 57 15
In re Flint, 25 Utah 338 ..... 9, 15
In re Markuson, 5 N. Dak. 180 16
In re Peterson, 19 Idaho 433 16
In re Strickler, 51 Kan. 700 16
In re Webb, 89 Wis. 354 16
Miller v. Evans, 115 Iowa 101 16
Miner v. United States, 244 Fed. 422 ..... 9, 15, 16
Mintie v. Biddle, 15 F. (2d) 931 ..... 9, 12, 31
Morgan v. Adams, 226 Fed. 719 ..... 14, 18
Musick v. United States, 2 F. (2d) 711 ..... 9, 15, 16
Neal v. State, 104 Ga. 509 16
Ormsby v. United States, 273 Fed. 977 ..... 15, 29
People v. Allen, 155 Ill. 61 15
People v. Barrett, 202 Ill. 287 ..... 9, 15
People v. Court of Sessions, 141 N. Y. 288 17
People v. Kennedy, 58 Mich. 372 15
Philpot v. State, 65 N. H. 250 17
Reese v. Olsen, 44 Utah 318 16
Republic of Hawaii v. Pedro, 11 Hawaii 287 15
Smith v. State, 188 Ind. 64 ..... 9, 15, 29
Sorrells v. United States, October Term, 1932, No. 177 .. 24
Spencer v. State, 125 Tenn. 64 16
State v. Abbott, 87 S. C. 466 16
State v. Drew, 75 N. H. 402 17
State v. Hilton, 151 N. C. 687 17
State v. Hockett, 129 Mo. App. 639 15
State v. Murphy, 23 Nev. 390 16
State v. Sapp, 87 Kan. 740 15
State v. Voss, 80 Iowa 467 16
Sylvester v. State, 65 N. H. 193 17
Tanner v. Wiggins, 54 Fla. 203 16
United States ex rel. Campbell v. Bishop, 47 F. (2d) 95 .. 17, 29
United States v. Maisel, 26 F. (2d) 275 22
United States v. Mayer, 235 U. S. 55 11
United States v. Murray, 275 U. S. 347 ..... 19, 22, 26, 27
United States v. Wilson, 46 Fed. 748 ..... 8, 9, 10, 11, 12
Warner v. State, 194 Ind. 426 ..... 9, 15
Weaver v. People, 33 Mich. 296 ..... 9, 15

Statutes:

Federal Probation Act of March 4, 1925, c. 521, 43 Stat. 1259 ..... 6, 19, 26

Page

Act of June 6, 1930, c. 406, 46 Stat. 503..... 19
United States Code, Title 28, Sec. 178..... 4

Authorities:

Bates, "*Probation in the United States Courts*", Year Book, National Probation Ass'n, 1931, p. 69..... 23
Best, "*Crime and the Criminal Law in the United States*" (New York, 1930), c. LIV, pp. 506-507..... 23
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Chute, "*The Development of Probation in the Federal Courts*", Year Book, National Probation Ass'n, 1929, pp. 217-224..... 23
McClintic, "*Probation*" (1931)..... 23
McSweeney, "*Federal Probation*", Year Book, National Probation Ass'n, 1930, pp. 140-146..... 23
Moore, "*The United States Probation System*", Journ. Crim. Law and Criminology, Vol. XXIII, pp. 638, 640.. 23, 25

Miscellaneous:

Congressional Record, Vol. 54..... 19
General Rules, United States District Court for the Southern District of New York..... 4
Hearings before the Subcommittte of the Senate Committee on the Judiciary, 64th Cong., 1st Sess., March 25, 1916..... 21
Hearings before the House Committee on the Judiciary on H. R. 42, 64th Cong., 1st Sess., May 13, 1916..... 21
House Report No. 1353, 64th Cong., 2d Sess., to accompany H. R. 20414, January 25, 1917..... 21
Hearings before the House Committee on the Judiciary on H. R. 340, H. R. 1111, and H. R. 12036, 66th Cong., 2d Sess., March 9, 1920..... 21
House Report No. 1054, 66th Cong., 2d Sess., to accompany H. R. 14136, May 28, 1920..... 21
Hearings before the House Committee on the Judiciary on H. R. 4126, 67th Cong., 1st Sess., May 31, 1921..... 21
House Report No. 423, 68th Cong., 1st Sess., to accompany H. R. 5195, April 1, 1924..... 21, 27
Hearings before Senate Committee on Judiciary, 68th Cong., 2d Sess., February 21, 1924..... 19, 21
House Report No. 1377, 68th Cong., 2d Sess..... 19, 21
House Document No. 493, 70th Cong., 2d Sess..... 19

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vs.

A. C. ADERHOLD, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA, RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR PETITIONER.

Opinions Below.

No opinion was rendered by the District Court. The *per curiam* opinion of the Circuit Court of Appeals (R. 7) is reported in 56 F. (2d) 152.

Jurisdiction.

The judgment of the Circuit Court of Appeals, affirming an order of the District Court for the Northern

District of Georgia dismissing a writ of *habeas corpus*, was entered February 20, 1932 (R. 8). A petition for rehearing was denied March 11, 1932 (R. 10). The petition for certiorari was filed June 6, 1932, and was granted December 5, 1932. The jurisdiction of this Court rests on Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

Statement.

Petitioner was indicted in the Southern District of New York for violation of Section 194 of the Criminal Code, stealing from the United States mails. On December 10, 1930, he was arraigned before Judge Coleman and pleaded guilty.

The clerk of the court at that time prepared and issued the following formal order (R. 2):

> "At a stated term of the United States District Court for the Southern District of New York, held at the United States court room in the borough of Manhattan, city of New York, on Dec. 10, 1930.
>
> Present: The Honorable Frank J. Coleman, judge.
>
> The United States *vs.* Joseph F. Miller, C58-392. U. S. Criminal Code, Sec. —. Stealing from U. S. mails.
>
> Deft. pleads guilty; sentence suspended.
>
> Ordered that the prisoner be discharged from the custody of the U. S. marshal.
>
> An extract from the minutes.
>
> (Signed) CHARLES WEISER,
>
> [SEAL.] *Clerk.*"

At a Stated Term of the UNITED STATES DISTRICT COURT, for the Southern District of New York, held at the United States Court Room, in the Borough of Manhattan, City of New York, on DEC 10 1930

PRESENT:

The Honorable FRANK J. COLEMAN
Judge.

THE UNITED STATES

C 8-39

vs

Joseph F. Miller

U. S. Criminal Code, Sec.

stealing from U. S. mails

Deft pleads guilty Sentence Suspended.

ORDERED that the prisoner be Discharged from the custody of the U. S. Marshal.

An extract from the minutes.

36021

Clerk

A photostatic copy of this order is inserted here.

The docket shows the following entry for the same day (R. 3):

> "Dec. 10, 1930—Pleads guilty; sentence suspd.
> Coleman, J."

Petitioner was discharged from the custody of the marshal, in obedience to the above order, as is indicated by a docket entry of December 15, 1930 (R. 3), as follows:

> "Dec. 15, 1930—Filed discharge from custody of U. S. marshal."

That he was so discharged may also be inferred from the fact that he was re-arrested on June 17, 1931 (R. 1). On that day petitioner was "brought before the court, and without a hearing and without the advice of counsel" was sentenced by another judge (R. 1). The following order of sentence and commitment was prepared by the clerk (R. 3):

> "At a stated term of the United States District Court for the Southern District of New York, held at the United States court room in the borough of Manhattan, city of New York, on June 17, 1931.
>
> Present: The Honorable Henry W. Goddard, judge.
>
> The United States *vs.* Joseph F. Miller, C58-392. U. S. Criminal Code, Sec. 194 U. S. C. C. Stealing from the U. S. mails.

On motion of the United States attorney, ordered sentenced.

The court thereupon proceeded to pass judgment, and sentenced the prisoner to be imprisoned for a term of four (4) years. Sentence to be executed at the U. S. penitentiary, Atlanta, Ga. Sentenced to date from June 17, 1931.

An extract from the minutes.

(Signed) CHARLES WEISER,

[SEAL.] *Clerk.*"

A photostatic copy of this order is inserted here.

On the same day the following entries were made in the docket (R. 3):

"June 17, 1931—P. G.; sentenced to four years U. S. penitentiary, Atlanta, Ga., Goddard, J.

"June 17, 1931—Issued commitment and duplicate."

The term of the District Court at which the plea of gulity was made and the order suspending the imposition of sentence and discharging the prisoner entered, began on December 2, 1930, and together with all extensions thereof ended on March 10, 1931. U. S. C. Title 28, Sec. 178; General Rule 6 of U. S. D. C. S. D., N. Y.

On November 12, 1931, petitioner filed a petition for a writ of *habeas corpus* in the District Court for the Northern District of Georgia (R. 4), and a writ issued directed to respondent, the warden of the Atlanta peni-

At a Stated Term of the UNITED STATES DISTRICT COURT.
for the Southern District of New York, held
at the United States Court Room, in the Borough
of Manhattan, City of New York, on JUN 17 1931

PRESENT:

The Honorable HENRY W GODDARD
Judge.

C58-392.

THE UNITED STATES : U.S.Criminal Code,
: Sec. 194 U.S.C.C.
vs : Stealing from the
: U.S.Mails
Joseph F. Miller, :

On motion of the United States Attorney, Ordered Sentenced.

The Court thereupon proceeded to pass judgment, and sentenced the Prisoner to be imprisoned for a term of

FOUR (4) YEARS

~~and to pay a fine of~~

~~and to stand committed until fine be paid or he is otherwise dis-~~
~~charged according to law.~~

Sentence to be executed at the **U.S.Penitentiary, Atlanta, Ga.**

Sentenced to date from June 17, 1931

An extract from the minutes.

Charles Urner

Clerk.

57364

tentiary. On December 12, 1931, the writ was dismissed and petitioner ordered remanded (R. 4). On appeal, this judgment was affirmed *per curiam* by the Circuit Court of Appeals for the Fifth Circuit (R. 7-8, 56 F. (2d) 152).

Specification of Errors.

1. The Circuit Court of Appeals erred in holding that a judge of the District Court for the Southern District of New York had jurisdiction, following an indefinite suspension of sentence and unconditional discharge of petitioner in a former term, to impose sentence and order commitment of petitioner to the penitentiary.

2. The Circuit Court of Appeals erred in affirming the order dismissing the writ of *habeas corpus*.

Summary of Argument.

The first order of the District Court, that of December 10, 1930, was clearly an indefinite or permanent suspension of the imposition of sentence. Petitioner was not placed on probation. This order, under the rule of the *Killits* case (*Ex parte United States*, 242 U. S. 27), was beyond the power of the court.

The law announced by this Court in that case is that while Federal courts have power to suspend the imposition or the execution of sentence temporarily for purposes consistent with the enforcement of the penal laws, they have no power by unconditional, permanent or indefinite suspensions, in effect, to refuse to impose the penalties for offenses provided by Congress.

With the passing of the trial term in which the invalid order of December 10, 1930, was entered, the trial court, according to the uniform holdings of the Federal and many State courts, lost jurisdiction thereafter to impose sentence. The Federal Probation Act of March 4, 1925, 43 Stat. 1259, c. 521, is inapplicable to the present case, because that act does not confer the power to suspend the imposition of sentence except as a necessary incident to subjecting a defendant to the discipline of probation. This was not done or attempted to be done in the present case. Consequently, when the trial court, on June 17, 1931, after the expiration of the trial term, entered its second order—that attempting to sentence and commit the petitioner—it was wholly without jurisdiction and the order was void.

ARGUMENT.

I.

The first order of the District Court was clearly an indefinite suspension of the imposition of sentence.

In the Memorandum filed by the Government on petition for certiorari herein, it is stated (p. 2) that "the order of the trial judge itself is not in the record". And similarly of the second order it is said (p. 3), "the order of the court itself is not in the record". We believe that the Government is here mistaken. What the Government's memorandum terms "brief extracts of the clerk's minutes" (p. 2, footnote) are, as we understand the practice in the Southern District of New York, the actual orders of

the Court. We do not understand that any other or further orders were, or are ordinarily in similar cases, made by the judge or entered by the clerk.

The first order is reproduced above. It is upon a printed discharge form, bears the signature of the Clerk and the seal of the Court, and constitutes the formal record of the order of the Court discharging the prisoner. Both this order and the docket entry contain the same words, "pleads guilty; sentence suspended". The Circuit Court of Appeals stated in its opinion (R. 7, 56 F. (2d) 152):

> "The district judge who received the plea suspended sentence *indefinitely.* * * *" (Italics ours.)

and again referred to the order as one "indefinitely and unconditionally suspending the imposition of sentence." We submit, therefore, that upon this matter of fact the record is complete, adequate, and leaves no doubt that, upon the plea of guilty being made, the court indefinitely suspended sentence and ordered the prisoner discharged.

The authorities are clear that such an order constitutes an indefinite or permanent suspension of sentence. In *Ex parte Singer,* 284 Fed. 60, the trial judge had said, at the time of imposing sentence on one count of an indictment, "I am not at this time going to sentence you on the other charges which are standing against you in this court." Judge Woolley, speaking for the Circuit Court of Appeals, held that this amounted to an indefinite postponement of sentence. He said (284 Fed. 62):

> "What the trial judge did at the trial term was to pass by the imposition of sentence upon the conviction on both counts of the information and on three counts of the indictment. This was in effect a suspension of the imposition of sentence; whether temporary or permanent the trial judge did not state. * * *
>
> "* * * But when a court declines to take action at the term of the conviction, it thereby inevitably postpones sentence, and when (in the absence of statute or accepted practice) a court postpones sentence silently, that is, without an indication of a lawful purpose, it in effect postpones sentence indefinitely. * * * That the inaction of the trial judge at the trial term on all counts of the information and on all counts of the indictment (save one) was, in effect, such a postponement of sentence, I cannot doubt. The judge said to the prisoner: 'I am not *at this time* going to sentence you on the other charges.' This left it uncertain whether he intended or did not intend to impose sentence on the other charges at some other time. That the postponement was therefore indefinite is clear. * * *"

In *United States* v. *Wilson*, 46 Fed. 748, the order of the trial court was that "sentence be suspended, and until further orders of this court, and that said defendant be released, and his bail exonerated." On appeal the Circuit Court said of this order (46 Fed. 749):

> "In this cause however, the record does not show that the suspension was for any such [temporary] reason, or for a certain or short time, but on the contrary, it appears that it was

> for such uncertain time as the defendant should continue to remain so favorably impressed with the laws of the land as to obey them. * * *"

The authorities are many that where the record shows a suspension of sentence and the release of the prisoner, the suspension is permanent and indefinite. *Mintie* v. *Biddle*, 15 F. (2d) 931; *People* v. *Barrett*, 202 Ill. 287; *Grundel* v. *People*, 33 Colo. 191; *Collins* v. *State*, (Okl. Cr. App.), 217 Pac. 896; *Smith* v. *State*, 188 Ind. 64; *In re Flint*, 25 Utah, 338; *Commonwealth* v. *Maloney*, 145 Mass. 205; *Weaver* v. *People*, 33 Mich. 296; *Warner* v. *State*, 194 Ind. 426.

The cases of *Miner* v. *United States*, 244 Fed. 422, and *Musick* v. *United States*, 2 F. (2d) 711, cited in the Memorandum of the Government (p. 5) are in no sense authorities to the contrary. The opinions in both of these cases were written by Judge Woolley, the author of the opinion in *Ex parte Singer, supra.* Indeed, *Ex parte Singer* cites the *Miner* case with approval, while the *Musick* case similarly cites *United States* v. *Wilson, supra.* The *Miner* and *Musick* cases hold only that when the suspension of imposition of sentence is by its own terms temporary and deferred to a definite future date, it will be presumed that the judge had a proper reason for such definite, temporary postponement even though the record does not disclose it.

This principle is, of course, wholly sound and is undisputed. If the record shows that the postponement was in terms to a definite time, it will clearly be presumed that the judge had proper reasons therefor. But it is equally true that when the record shows that the

suspension was by its terms indefinite, no presumption can change the record fact.

We submit, then, that upon the record in this case and upon the authorities, the order of the trial court on December 10, 1930, was an indefinite suspension of sentence. The order further in specific terms directed the discharge of the prisoner from custody. There was no order placing him upon probation.

II.

The order indefinitely suspending the imposition of sentence was invalid. With the expiration of the trial term, the Court, according to the uniform holding of Federal and many State courts, lost jurisdiction thereafter to sentence petitioner.

Ex parte United States, 242 U. S. 27 (commonly referred to as the *Killits* case) established that judges of United States courts did not have authority to suspend indefinitely the imposition or execution of sentence.[1] This doctrine had previously been announced by at least one Federal court (*United States* v. *Wilson*, *supra*) and by many State courts (see footnote, 242 U. S. 47). Thus many courts had already been or were soon called upon to consider the jurisdiction of a trial court to impose sentence after the expiration of the term of court at which an invalid order, indefinitely

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[1] The Court below held that "The order indefinitely and unconditionally suspending the imposition of sentence was void. *Ex parte United States*, 242 U. S. 27" (R. 7, 56 F. (2d) 152).

suspending the imposition of sentence and discharging the prisoner, had been made. Compare *United States* v. *Mayer,* 235 U. S. 55.

The law announced by the Federal courts, and by those State courts which concurred in the doctrine of the *Killits* case, was uniform that with the expiration of the trial term the trial court lost jurisdiction and that any attempted imposition of sentence thereafter was void.

United States v. *Wilson,* 46 Fed. 748, cited with approval by this Court in *Ex parte United States, supra,* at page 50, appears to have been the first case in the Federal courts. In June, 1888, imposition of sentence in that case was suspended upon defendant's promise to obey the law. In June, 1890, the trial judge's successor revoked the order and imposed sentence. The Circuit Court held that the trial judge transcended his authority by the order of suspension, and continued (p. 749):

> "The court having erred in its order of suspension of sentence, can it subsequently, at another term of court, and especially by a judge, who did not try the case, revoke such order, and proceed to a rendition of judgment? To hold that a court may from time to time, and term to term, revoke its orders, and by new orders attempt the correction of former errors, to say the least, would lead to a most uncertain practice. * * *"

Judgment was reversed and the defendant discharged.

In *Ex parte Singer,* 284 Fed. 60 (C. C. A. 3rd) defendant was sentenced on the third of several counts,

sentences on other counts being indefinitely deferred. An appeal was taken from the sentence imposed on the ground that it was excessive, and it was so held to be. Three terms after the trial term the trial court resentenced the defendant and at that time also imposed consecutive sentences upon certain of the remaining counts. After serving the period of the sentence imposed on the third count, the petitioner brought *habeas corpus* and was discharged. Judge Woolley said (pp. 63-4):

> "The weight of authority is that when a court has, without a valid reason and quite indefinitely, postponed the pronouncement of sentence, it cannot at a subsequent term proceed to judgment by imposing sentence. *United States* v. *Wilson* (C. C.), 46 Fed. 748; *Ex parte United States*, 242 U. S. 27, 50. * * * If after taking no action on the conviction under the first and second counts of the information and under the first, second and fourth counts of the indictment for more than three terms, the trial judge retained jurisdiction to enter judgment by imposing sentence under the second count of the information and under the first count of the indictment (sale counts), he has like jurisdiction, now or any time in the future, to impose sentence on the conviction under the first count of the information and second and fourth counts of the indictment (transportation counts), with reference to which the imposition of sentence is still pending. Clearly such a proposition cannot be sustained by any principle of law found in the authorities."

In *Mintie* v. *Biddle*, 15 F. (2d) 931 (C. C. A. 8th), the defendant pleaded guilty and was released. This

case was continued to the next term, without any sentence being then imposed or any order entered. Thereafter no further order was made in the case for some thirty-four months and in the meantime five terms of court came and went. Thereupon petitioner was ordered to appear as a witness and upon doing so was put in jail and sentenced. He was discharged on *habeas corpus*. The court said (p. 933):

> "So the question presented by the case is whether the trial court, by postponing the sentence of petitioner indefinitely, lost jurisdiction to lawfully impose a sentence on him at all.
>
> "We think it did, and we think the great weight of the ruled cases, as well as of the analogous authorities and the reason of the thing, lead to the same conclusion. Some latitude of action of the court, referable to the furtherance of the administration of justice, of course exists. * * * Here, however, the government, for its own ends and convenience deferred sentence till such time as the district attorney might see fit to notify defendant to appear. Thirty-four months passed, and then defendant was notified to appear as a witness, and not as a defendant. Obviously, the matter of the furtherance of the administration of justice is not a unilateral one. The accused is due some modicum of consideration. It is not alone the ends and accommodation of the government which are to be considered and subserved; but those of the defendant as well. Held thus in suspension indefinitely and for a period which turned out to be thirty-four months, defendant could, in the interim, make no plans, enter into no contracts, engage in no permanent occupa-

> tion, and bind himself to no obligations, or create any permanent ties, business or domestic. But so much for the reasons for the view that an indefinite deferment of sentence is not warranted by matters which merely rest *in pais*. Let some reference be made to the cases."

The court distinguished its own prior decision in *Morgan* v. *Adams*, 226 Fed. 719 (C. C. A. 8th) which did not involve the suspension of *imposition* but the suspension of *execution* of a sentence properly imposed. It pointed out, as it had done in the earlier case, that the two parts of the trial court's order therein were separate and distinct; one part was valid and imposed sentence, the other was invalid and attempted to suspend the execution of the sentence. The net result was a valid sentence of which a prisoner seeking to be discharged on *habeas corpus* could not complain.

The court then reviewed the cases already cited here and a number of State cases. Those State courts, which hold that judges do not have the power to suspend indefinitely the imposition of sentence, also hold that where such action is attempted and thereafter the trial term expires, the trial court is without jurisdiction to impose sentence.[2]

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[2]In the citation of State cases there have often been confused cases relating to suspension of the *imposition* of sentence and cases relating to suspension of *execution* of sentence. The following cases hold that, when the imposition of sentence has been indefinitely suspended or postponed and the trial term has expired, the trial court has no jurisdiction thereafter to

We have found no decision to the contrary by any Federal court with the exception of the *De Angelo* case, *infra,* decided on the assumed authority of the Federal Probation Act and discussed below. The doctrine of the *Wilson* case is tentatively accepted by the Circuit Court of Appeals for the Sixth Circuit, in *Ormsby* v. *United States,* 273 Fed. 977, though not involved in that case. And we have already pointed out that *Miner* v. *United States, supra,* and *Musick* v. *United States, supra,* involved only suspensions specifically made temporary and which are admittedly valid and proper. Furthermore, the opinions in the *Miner* and *Musick* cases were written by Judge Woolley. In both opinions he cited *Ex parte Wilson* with approval, and after the *Miner* case but before the *Musick* case he wrote the opinion in *Ex parte Singer.* It is clear, therefore, that Judge Woolley did not re-

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impose sentence: *Grundel* v. *People,* 33 Colo. 191 (1905); *Republic of Hawaii* v. *Pedro,* 11 Hawaii 287 (1898); *People* v. *Allen,* 155 Ill. 61 (1895); *People* v. *Barrett,* 202 Ill. 287 (1903); *Smith* v. *State,* 188 Ind. 64 (1919); *Warner* v. *State,* 194 Ind. 426 (1924); *In re Beck,* 63 Kan. 57 (1901); *State* v. *Sapp,* 87 Kan. 740 (1912); *Weaver* v. *People,* 33 Mich. 296 (1876); *State* v. *Hockett,* 129 Mo. App. 639 (1908); *Collins* v. *State,* 217 Pac. 896 (Okla. Cr. App. 1923); *In re Flint,* 25 Utah 338 (1903). See *People* v. *Kennedy,* 58 Mich. 372 (1885); *Hitchcock* v. *State,* 145 Tenn. 626 (1921).

Among States, in which the rule of the *Killits* case is in force, there is a division of authority upon whether, after *execution* of sentence has been suspended and the term of court has expired, the defendant may be lawfully imprisoned. The following cases

gard his utterance in either the *Miner* or the *Musick* case as containing any disapproval or limitation of the rule laid down in *Ex parte Wilson* and followed by him in *Ex parte Singer*. In fact he himself made this clear by saying, in the *Miner* case (244 Fed. 424):

> "This being true [*i. e.*, that the suspensions were temporary and definite], the validity of the orders postponing sentence is established, leaving for decision no question of the court's jurisdiction to impose sentence at a later term."

The *Musick* case was decided upon the same ground, as was also *Gillespie* v. *Walker*, 296 Fed. 330 (C. C. A. 4th).

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hold that the suspension being invalid and the sentence valid, the prisoner may be lawfully held: *Tanner* v. *Wiggins*, 54 Fla. 203 (1907); *Neal* v. *State*, 104 Ga. 509 (1898); *Miller* v. *Evans*, 115 Ia. 101 (1901); *Brabandt* v. *Commonwealth*, 157 Ky. 130 (1914); *Fuller* v. *State*, 57 So. 6, 100 Miss. 811, 57 So. 806 (1912); *State* v. *Abbott*, 87 S. C. 466 (1910); *Spencer* v. *State*, 125 Tenn. 64 (1911); *Reese* v. *Olsen*, 44 Utah 318 (1914). The following cases hold that subsequent imprisonment is unlawful: *State* v. *Voss*, 80 Ia. 467 (1890); *In re Peterson*, 19 Id. 433 (1911); *In re Strickler*, 51 Kan. 700 (1893); *Ex parte Cornwall*, 223 Mo. 259 (1909); *State* v. *Murphy*, 23 Nev. 390 (1897); *In re Markuson*, 5 N. Dak. 180 (1895); *Ex parte Clendenning*, 22 Okla. 108 (1908); *In re Webb*, 89 Wis. 354 (1895). Compare *Ex parte Bugg*, 163 Mo. App. 44 (1912).

In those jurisdictions in which the rule of the *Killits* case is not law, and a court may lawfully suspend indefinitely the imposition or execution of sentence, it is usually held that such proper suspension may later

The case of *United States ex rel. Campbell* v. *Bishop*, 47 F. (2d) 95 (C. C. A. 5th), though cited by the Circuit Court of Appeals in this case (R. 7) and by the Government's Memorandum (p. 7) was, in reality, not a ruling upon the question here involved. *In that case everything occurred within the same term of court.* Moreover, there was no suspension *of the imposition of sentence.* The defendant pleaded guilty. The sentence as recorded by the Clerk was a fine and imprisonment, the prison sentence to be suspended upon the payment of the fine. Soon thereafter defendant was arrested for violating probation and after a hearing was delivered to the penitentiary to serve his sentence. The trial judge thereafter ordered, within the term, that the minute recording the sentence

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be revoked and commitment ordered. Compare, as to indefinite suspension of imposition, *Ex parte Williams*, 26 Fla. 310 (1890); *Ex parte St. Hilaire*, 101 Me. 522 (1906); *Commonwealth* v. *Dowdican's Bail*, 115 Mass. 133 (1874); *Philpot* v. *State*, 65 N. H. 250 (1889); *People* v. *Court of Sessions*, 141 N. Y. 288 (1894); *Commonwealth* v. *Dunleavy*, 16 Pa. Sup. Ct. 380 (1901). Compare, as to indefinite suspension of execution, *Sylvester* v. *State*, 65 N. H. 193 (1889); *State* v. *Drew*, 75 N. H. 402 (1909). Even in these jurisdictions, if the conditions of suspension are complied with, the court may lose its power to revoke the suspension. See *State* v. *Hilton*, 151 N. C. 687 (1909). Cases often cited as contrary to the prevailing rule discussed in the text are usually found to have arisen in these jurisdictions in which the rule of the *Killits* case is not law.

be corrected to conform to the bench docket and the following was thereupon added to it (47 F. (2d) 96):

> "and that you be paroled to W. F. Fox, Deputy Marshal, and shall report to him every 30 days. Upon violation of any law parole to be cancelled and remission to serve term."

The Court said (as Judge Sanborn had in *Morgan* v. *Adams, supra*) that, if the sentence as originally recorded had been the one pronounced, it would have been valid in so far as it imposed a fine and imprisonment and invalid in so far as it attempted indefinitely to suspend the execution of the prison term. The invalid portion could have been eliminated leaving the valid portion. It also held that a court has complete power within the term to correct an error in the recording of its judgments. The case, therefore, is in no sense a decision upon the point here under consideration.

The foregoing cases set forth the state of the law upon the point here in question unless it has been altered by the Federal Probation Act. They hold that if a court indefinitely suspends the imposition of sentence and discharges the defendant, it loses jurisdiction with the passing of the trial term, and any order entered thereafter sentencing the defendant is void. The Circuit Court of Appeals for the Sixth Circuit, in deciding *Ex parte De Angelo,* 50 F. (2d) 847, the case chiefly relied upon by the Government, concedes that prior to the Probation Act the law was as here stated. We shall consider that case with the statute upon which it is based.

III.

The Federal Probation Act does not confer the power to suspend sentence except as a necessary incident to subjecting a defendant to the discipline of probation.

The *Killits* case was decided in December, 1916. Chief Justice White there pointed out the power of Congress to enact probation legislation, 242 U. S. 27, 52; see *United States* v. *Murray,* 275 U. S. 347, 357. On February 28, 1917, a probation act passed the Congress and was sent to President Wilson. Congressional Record, Vol. 54, pp. 3637, 4373, 4527. He retained it unsigned and upon the expiration of the 64th Congress it failed to become law.[3] Such an act was finally approved March 4, 1925, 43 Stat. 1259, c. 521, and amended by the Act of June 6, 1930, c. 406, 46 Stat. 503; U. S. C. Tit. 18, Sec. 724-728. The Act, as amended, is printed in full as an appendix to this brief, page 33, *infra.*

The Act provides that courts of the United States having original jurisdiction over criminal actions,

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[3]It has been said that this action was taken on the advice of Attorney General Gregory. House Report No. 1377, 68th Cong., 2d Sess., p. 3; "Probation System in United States Courts", Hearings Before Senate Committee on Judiciary Feb. 21, 1924, p. 4. A note attached to the engrossed bill, which had been sent to the President, is as follows: "Dear Forster. I let this bill die. Please do what is usual with it. W. W." "Report on Pocket Veto", House Document No. 493, 70th Cong., 2d Sess., p. 41.

when it shall appear to the satisfaction of the court that the ends of justice and the best interests of the public, as well as the defendant, will be served thereby, shall have power, after conviction or after a plea of guilty or *nolo contendere* for any crime or offense not punishable by death or life imprisonment, to suspend the imposition or execution of sentence and to place the defendant upon probation for such period and upon such terms and conditions as they may deem best, or the court may impose a fine and may also place the defendant upon probation. The act confers upon the courts broad powers to revoke or modify any condition of probation or to change the period, except that such period together with any extensions may not exceed five years. It provides that judges of the district courts may appoint suitable persons to serve as probation officers without salary unless the needs of the public service require salaried officers, in which case they may be appointed. The duties of the probation officers are to furnish each person released on probation with a written statement of the conditions of probation, to keep informed concerning the probationer's conduct and condition and to report thereon to the court, to use all suitable means to improve the conduct and condition of probationers and to keep records of their work. The Attorney General is given supervisory powers over probation officers. If the conduct of the probationer is unsatisfactory, the officer may bring him before the court at any time within the maximum period for which he might have been sentenced and the court, if it deems best, may sentence the probationer or cause him to serve

the sentence previously imposed. If a probationer's conduct is satisfactory, the judge may discharge him and terminate the proceedings against him.

The report of the House Committee and the hearings held before the Senate Committee upon this bill, as well as the language of the act itself, leave no doubt that the purpose sought to be achieved was the creation of an elastic and salutary system of discipline to which might be subjected those who had been convicted of crime, but who might, in the opinion of the court, be restored to a useful position in society.[4]

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[4]House Report No. 1377, 68th Congress, 2d Session, and Hearings Before Subcommittee of Senate Committee on the Judiciary, February 21, 1924, "Probation System in United States Courts". For legislative hearings and Committee reports upon similar bills see "Probation System for Federal Prisoners", Hearings Before the House Committee on the Judiciary, on H. R. 42, 64th Congress, 1st Session, May 13, 1916; Hearings Before the Subcommittee of the Senate Committee on the Judiciary, *id.*, March 25, 1916; "Probation System in United States Courts", H. R. Rep. No. 1353, 64th Congress, 2d Session, to accompany H. R. 20414, January 25, 1917; Hearings Before the House Committee on the Judiciary, on H. R. 340, H. R. 1111, and H. R. 12036, 66th Congress, 2d Session, March 9, 1920; "Parole and Probation System for United States Courts", H. R. Rep. No. 1054, 66th Congress, 2d Session, to accompany H. R. 14136, May 28, 1920; Hearings Before the House Committee on the Judiciary, on H. R. 4126, 67th Congress, 1st Session, May 31, 1921; "Probation System in United States Courts", House Report No. 423, 68th Congress, 1st Session, to accompany H. R. 5195, April 1, 1924.

This purpose is commented upon by this court in *United States* v. *Murray, supra,* at page 357. It is also expounded by Judge Hutcheson in *United States* v. *Maisel,* 26 F. (2d) 275, in the course of which he said:

> "The statute in effect has accomplished at one stroke for the Federal courts the redramatization of the criminal law, which modern theories of criminal administration, with their tremendous emphasis upon individualization, have been slowly effecting, in the states of the United States and in foreign countries, a redramatization in which the controlling motif in the drama is the discovery of the true character of the individual before the bar, and the possibility of his readjustment without confinement, into the social scheme, * * *."

The fundamental element in this legislation—what Judge Hutcheson called the controlling motif of this redramatization—was the system of probation.[5] The

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[5] "Probation is also similar in some respects to suspension of sentence (and is sometimes unfortunately regarded as practically its equivalent). It implies, however, much more; and is in fact something quite distinct. It is a relatively full and formal procedure, and one demanding a certain definite organization. It does not stop with the mere respite of a sentence and the holding of it in abeyance. It goes to the extent of providing official surveillance and control for a given period, together with a preliminary study of the offender, the imposing upon him of definite conditions, and the committing of him to helpful influences—all integral parts of the system. * * * Probation con-

discipline of probation was to be substituted, in appropriate cases, for punishment which had been the only resource of the earlier theories of penology. This system of discipline was elaborately provided for. The judge might appoint suitable persons as probation officers with or without salary as need dictated. These officers were to supervise, counsel and befriend the probationer. He was to report to them regularly and they to the court. If the prisoner did not respond to this regimen, the law gave the court ample power to resort to sterner measures. If he did respond, the court, as Judge Hutcheson pointed out, might terminate all proceedings against him and restore him to society without the brand of criminality upon him.

It was for the purpose of making this system of discipline possible—and for this purpose only—that the district courts were given power to suspend the im-

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stitutes a disciplinary process which seeks to improve the behavior and the character of the offender." Best, *"Crime and the Criminal Law in the United States"* (New York, 1930) c. LIV, pp. 506-507. See also Cantor, *"Crime—Criminals and Criminal Justice"* (New York, 1932) c. XX, p. 335; *"The United States Probation System"*, Joel R. Moore, Supervisor, U. S. Probation System, Journal of Criminal Law and Criminology, Vol. XXIII, p. 638 (Dec. 1932). See generally, Chute, *"The Development of Probation in Federal Courts,"* Year Book National Probation Association, 1929, pp. 217-224; Bates, *"Probation in the United States Courts"*, *id.*, 1931, p. 69; McSweeney, *"Federal Probation"*, *id.*, 1930, pp. 140-146; McClintic, *"Probation"*, Address Before the Federal Judicial Conference, 1931.

position or the execution of sentence. There is not the slightest indication, either in the language of the statute, the report of the committee, or in the testimony of those persons who appeared at the hearings, that Congress had intended to confer on the district courts the arbitrary and uncontrolled power to suspend either the imposition or the execution of sentence without more. Such a power had been condemned by the Chief Justice in the *Killits* case as containing within it the power to refuse to enforce the criminal law. 242 U. S. 27, 42. The unaltered opposition of this court to any such power has recently been reaffirmed. In *Ex parte United States,* October Term, 1932, No. 19, Original, decided December 5, 1932, Mr. Justice Sutherland, speaking for the Court, said:

> "The authority conferred upon the trial judge to issue a warrant of arrest upon an indictment does not, under the circumstances here disclosed, carry with it power to decline to do so under the guise of judicial discretion; or, as this court suggested in *Ex parte United States,* 242 U. S. 27, 42, the power to enforce does not inherently beget a discretion permanently to refuse to enforce."

And again in *Sorrells* v. *United States,* October Term, 1932, No. 177, decided December 19, 1932, the Chief Justice, after citing the *Killits* case, said:

> "* * * In that case this Court decisively denied such authority to free guilty defendants, in holding that the court had no power to suspend sentences indefinitely. * * * And while recognizing the humane considerations which

> had led judges to adopt the practice of suspending sentences indefinitely in certain cases, the court found no ground for approving the practice 'since its exercise in the very nature of things amounts to a refusal by the judicial power to perform a duty resting upon it and, as a consequence thereof, to an interference with both the legislative and executive authority as fixed by the Constitution.' "

This principle is as essential to the administration of justice under the Constitution after the Probation Act as before. A district court can have no more power now than it had before to refuse to enforce the law, and Congress has not attempted to confer any such improper power. Congress has merely provided an alternative method of correction which the court may, in its discretion, employ.[6] To argue that by pro-

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[6] In "The United States Probation System," Journal of Criminal Law and Criminology, Vol. XXIII, p. 638, at p. 640, Mr. Moore, Supervisor U. S. Probation System, says:

> "At this point let me quote my chief, Sanford Bates, Director of the Bureau of Prisons, to whose vision and expert advice this U. S. Probation System is due:
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> "'* * * It would be unthinkable today if there were not some alternative to imprisonment, an alternative which would not turn the culprit free but would retain a measure of control and guidance for his benefit and the protection of society.'
>
> "The probation alternative was made possible by the Act of Congress signed by President Coolidge March 4, 1925."

viding such an alternative method Congress has enabled courts to refuse to enforce either method—probation or imprisonment or fine—is to deny the fundamental principles upon which the *Killits* case and *Ex parte United States, supra,* were decided.

In so far as this Court has considered the Probation Act, its construction of it has been entirely in accord with the principles set forth above. In *United States* v. *Murray,* 275 U. S. 347, 357, Chief Justice Taft said:

> "The great desideratum was the giving to young and new violators of law a chance to reform and to escape the contaminating influence of association with hardened or veteran criminals in the beginning of the imprisonment. Experience had shown that there was a real *locus pœnitentiæ* between the conviction and certainty of punishment, on the one hand, and the actual imprisonment and public disgrace of incarceration and evil association, on the other. If the case was a proper one, great good could be done *in stopping punishment by putting the new criminal on probation.* The avoidance of imprisonment at time of sentence was therefore the period to which the advocates of a Probation Act always directed their urgency. * * *" (Italics ours)

And in *Burns* v. *United States,* October Term 1932, No. 378, decided December 5, 1932, Chief Justice Hughes said:

> "The Federal Probation Act (March 4, 1925, c. 521, 43 Stat. 1259; U. S. C., Tit. 18, secs. 724-727), confers an authority commensurate with its object. It was designed to provide a period

of grace in order to aid the rehabilitation of a penitent offender; to take advantage of an opportunity for reformation which actual service of the suspended sentence might make less probable. *United States* v. *Murray*, 275 U. S. 347, 357, 358; H. R. Rep. No. 423, 68th Cong., 1st Sess. Probation is thus conferred as a privilege and cannot be demanded as a right. It is a matter of favor, not of contract. There is no requirement that it must be granted on a specified showing. The defendant stands convicted; he faces punishment and cannot insist on terms or strike a bargain. To accomplish the purpose of the statute, an exceptional degree of flexibility in administration is essential. It is necessary to individualize each case, to give that careful, humane and comprehensive consideration to the particular situation of each offender which would be possible only in the exercise of a broad discretion. The provisions of the Act are adapted to this end. It authorizes courts of original jurisdiction, when satisfied 'that the ends of justice and the best interests of the public, as well as the defendant, will be subserved', to suspend the imposition or execution of sentence and 'to place the defendant upon probation for such period and upon such terms and conditions as they may deem best'.

* * * * * * * *

"Such procedural provisions as the Act contains harmonize with the view that the continuance of the probation, as well as the grant of it, rests in the court's discretion. * * *

"* * * He is still a person convicted of an offense, and the suspension of his sentence remains within the control of the court. The con-

> tinuance of that control, apparent from the terms of the statute, *is essential to the accomplishment of its beneficent purpose, as otherwise probation might be more reluctantly granted or, when granted, might be made the occasion of delays and obstruction which would bring reproach upon the administration of justice.*" (Citing cases.) (Italics ours.)

In these two opinions the Court makes it clear that the power given to the district courts is to suspend sentence *and* place upon probation, or as Chief Justice Taft expressed it, to stop punishment "by putting the new criminal on probation". The power to suspend the imposition of sentence is regarded as merely incidental and "essential to the accomplishment of its beneficent purpose"—probation. The Court appeared to have no doubt that the prisoner was facing either punishment or probation. There was no third alternative by which the judge could refuse to follow the dictate of Congress, and either discharge or retain control over the prisoner to carry out some plan of his own. On the contrary, on the same day on which the *Burns* case was decided the Court reaffirmed its adherence to the principle that judges cannot, through any exercise of discretionary power, refuse to enforce the law.

The Probation Act, therefore, conferred no authority upon Judge Coleman to enter the order of December 10, 1930. Furthermore, since the trial judge did not even purport to place the petitioner upon probation under that Act, its various provisions dealing with the control which may be exercised over prisoners

on probation have no application to this case. Compare *Smith* v. *State,* 188 Ind. 64, 66; *Ex parte Cornwall,* 223 Mo. 259, 270.

The only case in the Federal courts which holds the contrary of the principles of law stated above, is *Ex parte De Angelo,* 50 F. (2d) 847 (C. C. A., 6th). In that case the defendant on June 22, 1928, pleaded guilty to a conspiracy charge. On June 27th his co-defendants were tried, found guilty and sentenced. Sentence upon defendant was deferred without designation of any specific date in the term or any succeeding term upon which sentence would be imposed. On July 15, 1930, in the fourth term after the trial term, he was sentenced. He brought *habeas corpus.* At that proceeding it appeared from oral testimony that after pleading guilty he asked to be given a chance. He was told by the United States Attorney that he would be called when wanted. He was later indicted on a narcotic charge and acquitted. He was then sentenced on his prior plea of guilty. The court accepts the *Wilson, Singer* and *Mintie* cases, *supra* (see *Ormsby* v. *United States, supra,* page 15), as stating the law prior to the Probation Act. It then declares, without analysis of the statute, that the Probation Act authorizes the suspension of sentence and the subsequent revocation of such suspension. The court further asserts that even if under the Act an indefinite suspension is void, then the *Killits* case and *United States* v. *Bishop, supra,* are authorities for the proposition that the judge may eliminate the suspension and order commitment to the penitentiary.

What has been said above demonstrates, we submit, that the court was in error regarding the construction of the Federal Probation Act. We submit, further, that it was again in error in relying upon the two cases cited for the proposition sought to be derived from them. Both of these cases related not to suspension of the imposition of sentence but to suspension of the execution of sentence. In both cases the action taken was within the same term of court. They hold only, therefore, as we have pointed out above, that if a judge imposes a valid sentence and at the same time attempts invalidly to suspend the execution thereof, the valid sentence remains and may be enforced. They are no authority whatever for, and do not even bear upon, the proposition that if a court has improperly suspended the imposition of sentence and the term of court has thereafter expired, the court retains jurisdiction to impose sentence. This case is, therefore, entirely unsupported either by the statute or by the authorities upon which it relies. It is opposed by a long line of well considered cases in the Federal courts and by a great weight of authority in the State courts.

We submit, therefore, that the law today is just as it was uniformly held to be before the Probation Act,[7] with the single exception that suspension of the im-

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[7]It should be pointed out that the court below did not rest its decision upon the Probation Act or upon the *De Angelo* case. It cited merely the *Bishop* case, which we have shown, *supra*, p. 17, did not involve any of the questions here under consideration.

position or execution of sentence, incidental to and necessary for an order of court placing a prisoner upon probation, is proper and valid. If the prisoner is not placed upon probation, the suspension of the imposition of sentence is void and upon the expiration of the trial term the trial court loses jurisdiction to impose sentence.

The maintenance of these principles is, we submit, essential not only to the orderly administration of the Probation Act but also to the orderly administration of the criminal law—objects far transcending in importance the fate of this petitioner or all persons who may be placed in the same position. But this is not to say that the interest of such persons is not a matter of grave public concern. Enlightened social policy demands that in appropriate cases punishment be held in abeyance while the individual is undergoing a course of discipline directed to his ultimate recovery and restoration to society. It quite as strongly demands that no person—even a convicted offender—be kept hanging between incarceration and freedom, subject to no restorative process, but merely to the uncontrolled disposition of prosecuting officers or judges. As the Circuit Court of Appeals for the Eighth Circuit pointed out in *Mintie* v. *Biddle, supra,* the accused is due some modicum of consideration. No policy of justice requires that he be held indefinitely in suspense, not knowing what disposition is to be made of him and unable in the meantime to make constructive plans, to enter into contracts, engage in a permanent occupation, or to create any permanent ties, business or domestic.

Conclusion.

We, therefore, respectfully submit that the trial court was without jurisdiction to enter the order of June 17, 1931, sentencing this petitioner to imprisonment; that his imprisonment pursuant to that sentence is unlawful; and that the order of the Circuit Court of Appeals herein should be reversed and the cause remanded with instructions to discharge the petitioner from the custody of the respondent.

Respectfully submitted,

DEAN G. ACHESON,
Counsel for Petitioner.

APPENDIX.

The Act of March 4, 1925, Chap. 521, 43 Stat. 1259, as amended by the Act of June 6, 1930, Chap. 406, 46 Stat. 503. United States Code, Title 18, Sec. 724-728.

SEC. 1. The courts of the United States having original jurisdiction of criminal actions, except in the District of Columbia, when it shall appear to the satisfaction of the court that the ends of justice and the best interests of the public, as well as the defendant, will be subserved thereby, shall have power, after conviction or after a plea of guilty or nolo contendere for any crime or offense not punishable by death or life imprisonment, to suspend the imposition or execution of sentence and to place the defendant upon probation for such period and upon such terms and conditions as they may deem best; or the court may impose a fine and may also place the defendant upon probation in the manner aforesaid. The court may revoke or modify any condition of probation, or may change the period of probation: *Provided,* That the period of probation, together with any extension thereof, shall not exceed five years.

While on probation the defendant may be required to pay in one or several sums a fine imposed at the time of being placed on probation and may also be required to make restitution or reparation to the aggrieved party or parties for actual damages or loss caused by the offense for which conviction was had, and may also be required to provide for the support of any person or persons for whose support he is legally responsible.

SEC. 2. When directed by the court, the probation officer shall report to the court, with a statement of the conduct of the probationer while on probation. The court may thereupon discharge the probationer from further supervision and may terminate the proceedings against him, or may extend the probation, as shall seem advisable.

At any time within the probation period the probation officer may arrest the probationer without a warrant, or the court may issue a warrant for his arrest. Thereupon such probationer shall forthwith be taken before the court. At any time after the probation period, but within the maximum period for which the defendant might originally have been sentenced, the court may issue a warrant and cause the defendant to be arrested and brought before the court. Thereupon the court may revoke the probation or the suspension of sentence, and may impose any sentence which might originally have been imposed.

SEC. 3. The judge or judges of any United States court or courts having original jurisdiction of criminal actions, except in the District of Columbia, may appoint one or more suitable persons to serve as probation officers within the jurisdiction and under the direction of the judge or judges making such appointments or of their successors. All such probation officers shall serve without compensation except that in case it shall appear to any such judge or judges that the needs of the service require that there should be salaried probation officers, such judge or judges may appoint such officers. The Attorney General shall fix the salaries to be paid probation officers and shall provide for

the necessary expenses of probation officers, including clerical service, and expenses for traveling when approved by the court. Such judge or judges may in their discretion remove any probation officer serving in their respective courts. The appointment of a probation officer shall be in writing and shall be entered on the records of the court or courts of the judge or judges making such appointment, and a copy of the order of appointment shall be delivered to the officer so appointed and a copy sent to the Attorney General. Whenever such judge or judges shall have appointed more than one probation officer he or they may designate one of such officers chief probation officer. Such chief probation officer shall direct the work of all probation officers serving in the court or courts of such judge or judges.

SEC. 4. It shall be the duty of a probation officer to investigate any case referred to him for investigation by the court in which he is serving and to report thereon to the court. The probation officer shall furnish to each person released on probation under his supervision a written statement of the conditions of probation and shall instruct him regarding the same. Such officer shall keep informed concerning the conduct and condition of each person on probation under his supervision and shall report thereon to the court placing such person on probation. Such officer shall use all suitable methods, not inconsistent with the conditions imposed by the court, to aid persons on probation and to bring about improvements in their conduct and condition. Each officer shall keep records of his work; shall keep accurate and complete accounts of all moneys collected from

persons under his supervision; shall give receipts therefor, and shall make at least monthly returns thereof; shall make such reports to the Attorney General as he may at any time require; and shall perform such other duties as the court may direct. Such officer shall perform such duties with respect to persons on parole as the Attorney General shall request. A probation officer shall have the power of arrest that is now exercised by a deputy marshal.

SEC. 4 (a). The Attorney General, or his authorized agent, shall investigate the work of the probation officers and make recommendations concerning the same to the respective judges and shall have access to the records of all probation officers. He shall collect for publication statistical and other information concerning the work of the probation officers. He shall prescribe record forms and statistics to be kept by the probation officers and shall formulate general rules for the proper conduct of the probation work. He shall endeavor by all suitable means to promote the efficient administration of the probation system and the enforcement of the probation laws in all United States courts. He shall incorporate in his annual report a statement concerning the operation of the probation system in such courts.

SEC. 5. This Act shall take effect immediately.